OFFICE OF THE
INVESTOR ADVOCATE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

MEMORANDUM

Delivered Electronically

TO: **Lynn Martin, President**
Jaime L. Klima, Chief Regulatory Officer
The NYSE Group, Inc.

FROM: **Rick A. Fleming, Investor Advocate**[1]
U.S. Securities and Exchange Commission

DATE: **April 21, 2022**

RE: **Recommendation of the Investor Advocate**

RECOMMENDATION:

To better protect investors, we recommend that exchanges amend their listing standards for Special Purpose Acquisition Companies (SPACs) to prohibit consummation of a business combination when public SPAC shareholders exercise their conversion rights for a majority of the shares.

I. Introduction

Pursuant to Section 4(g)(4) of the Securities Exchange Act of 1934 ("Exchange Act"),[2] the Office of the Investor Advocate at the U.S. Securities and Exchange Commission ("Commission" or "SEC") is responsible for, among other things, identifying areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-

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[1] This recommendation expresses solely the views of the Investor Advocate. It does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for all analyses, findings, and conclusions contained herein.

[2] 15 U.S.C. § 78d(g)(4).

regulatory organizations. This past month, the Commission proposed rules and amendments to enhance disclosure and investor protection in initial public offerings by SPACs and in business combination transactions involving shell companies, such as SPACs, and private operating companies.[3] This proposal, which is still out for public comment, requires additional disclosures about SPAC sponsors, conflicts of interest and sources of dilution. These common sense proposals go a long way toward enhancing investor protections in connection with SPACs.

However, we believe that the national securities exchanges also have a role to play in addressing some of the policy issues that have come to light in the last few years. Specifically, we urge the exchanges to join the Commission in this effort to enhance investor protection and market integrity by adopting listing standards to address the growing problem of "empty voting." As more full described below, empty voting is a practice that brings companies into our public markets even though the majority of SPAC shareholders have, by redeeming their shares, expressed a lack of faith in the companies' future prospects.

Both the New York Stock Exchange LLC ("NYSE") and NYSE American LLC ("NYSE American") permit the listing of SPACs,[4] which are companies with no operating history whose business plan is to complete an initial public offering and engage in a merger or acquisition with

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[3] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Exchange Act Rel. No. 94546 (proposed March 30, 2022), https://www.sec.gov/rules/proposed/2022/33-11048.pdf [hereafter "SPAC Proposing Release"]. *See also* Press Release, SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections, 202256 (March 30, 2022), https://www.sec.gov/news/press-release/2022-56.

[4] *See* NYSE Listed Company Manual Section 102.06 (Minimum Numerical Standards - Acquisition Companies) and NYSE American Company Guide Section 119 (Listing of Companies Whose Business Plan is to Complete One or More Acquisitions). Other exchanges also permit the listing of SPACs. *See*, *e.g.*, NASDAQ IM-5101-2 (Listing of Companies Whose Business Plan is to Complete One or More Acquisitions).

one or more unidentified companies within a specific timeframe, subject to certain conditions.[5] SPACs raise capital in an initial public offering ("IPO"), the proceeds of which are placed in an escrow account until shareholders vote to approve a proposed business combination. If a majority of shareholders do not approve a deal within the relevant time frame, shareholders generally have the option to have their investment returned from escrow.

The Office of the Investor Advocate has been monitoring the experience of investors in exchange-listed SPACs in recent years, and we have identified an investor protection issue involving the current exchange listing standards.[6] Specifically, exchange listing standards permit SPACs to consummate a business combination even when a majority of the shareholders elect to tender or redeem a majority of shares for cash instead of remaining invested in the post-business combination operating company. Recent investor experience in business combinations that result from such circumstances suggests that this outcome may be inconsistent with investor protection. As more fully described below, we believe that investors would be better protected if exchange listing standards would permit a SPAC's proposed business combination to be consummated only when at least half of the public shares from the IPO remain invested. In light of these investor protection concerns, we recommend that the exchanges propose to amend their

[5] We are aware that other national securities exchanges have imported the substance of the NASDAQ Stock Market LLC ("Nasdaq") and NYSE American listing standards into their own rule book. *See, e.g.*, CBOE BZX Exchange, Inc. Rule 14.2(b) and BOX Rule 26119. *See also* BOX Exchange LLC; Notice of Filing of Proposed Rule Change To Adopt Rules Governing the Trading of Equity Securities on the Exchange Through a Facility of the Exchange Known as Boston Security Token Exchange LLC, Exchange Act Release No. 92017 (May 25, 2021), 86 Fed. Reg. 29,634 (File No. SR-BOX-2021-06) (noting "[t]he BSTX Rule 26100 Series are based on the NYSE American Original Listing Requirements (Sections 101-146)"), https://www.federalregister.gov/d/2021-11410. We would expect those exchanges to also incorporate any changes into their own rule books as well.

[6] As noted above, the Commission recently proposed rules to enhance disclosure and investor protection relating to SPACs. *See* SPAC Proposing Release, *supra* note 3. While the proposal contains a number of tailored rules for investor protection, it does not directly address changes to current exchange listing standards.

SPAC listing standards in order to provide more fulsome protection to investors through a meaningful conversion rights threshold.

II. Historical Background

The Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed, in general, to protect investors and the public interest.[7] The listing standards of an exchange should therefore be designed to protect financial markets and the investing public. For an issuer, listing on an exchange provides an environment that, in comparison to being quoted in over-the-counter markets, offers the potential for enhanced liquidity, transparency, and oversight. These benefits flow to investors. Thus, we generally support efforts to help companies, including small and mid-size companies, become or remain listed on exchanges under appropriate circumstances. We also acknowledge that the Exchange Act permits exchanges to develop their own eligibility standards for securities traded on their markets and that these standards may differ among exchanges.

As the Commission has stated previously, the development and enforcement of adequate standards governing the initial listing and maintenance of listing of securities is an activity of critical importance to financial markets and the investing public.[8] Listing standards serve as a means for a marketplace to screen issuers and to provide listed status only to *bona fide* companies with sufficient float, investor base, and trading interest to maintain fair and orderly markets.[9] In addition to those quantitative standards, qualitative requirements, such as audit

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[7] *See* 15 U.S.C. § 78f(b)(5).

[8] *See*, *e.g.*, Exchange Act Release No. 65225 (Aug. 30, 2011), 76 Fed. Reg. 55,148 (Sept. 6, 2011), File No. SR-BATS-2011-018, http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22627.pdf (Order Approving Proposed Rule Change to Adopt Rules for the Qualification, Listing and Delisting of Companies on the Exchange).

[9] *See id.* at 55152 n.30.

committees, independent director oversight of executive compensation, a mandatory code of conduct, shareholder meetings (including proxy solicitation and quorum), review of related party transactions, shareholder approval (including voting rights), and disclosure policies should be designed to ensure that companies trading on a national securities exchange will adequately protect the interests of public shareholders.[10]

Historically, exchanges denied initial listings to securities of companies lacking a specific business plan or ones that indicated that their plan was solely to engage in a merger or acquisition with an unidentified company. But in 2005, the American Stock Exchange (now NYSE American) began listing SPACs pursuant to generic listing standards that did not require operating histories,[11] and then in 2008, NYSE and NASDAQ obtained Commission approval to list and trade SPACs pursuant to more tailored listing standards.[12]

Although formal listing standards and exchange trading for SPACs was a significant milestone, the corporate structure for modern SPACs developed in the early 1990s while they mainly traded on over-the-counter ("OTC") bulletin boards.[13] At that time, SPAC corporate

[10] *See id.* at 55152.

[11] Prior to 2010, when NYSE American LLC adopted Section 119 of its Listed Company Guide, certain SPACs companies had listed under Initial Listing Standards 3 or 4, which did not require prior operating history, as long as certain protections were provided to investors, such as requiring a shareholder vote prior to any acquisition. Section 119, which was substantively identical to a 2008 NASDAQ listing standard for SPACs, provided greater transparency to the listing criteria. *See* Exchange Act Release No. 63366 (Nov. 23, 2010), 75 Fed. Reg. 74,119 (Nov. 30, 2010), File No. SR-NYSEAmex-2010-103, https://www.federalregister.gov/d/2010-30087.

[12] *See* Exchange Act Release No. 27597 (May 6, 2008), 73 Fed. Reg. 27,597 (May 13, 2008), File No. SR-NYSE-2008-17, https://www.federalregister.gov/d/E8-10537 [hereinafter "NYSE SPAC Approval Order"]; Exchange Act Release No. 58228 (July 25, 2008), 73 Fed. Reg. 44,794 (July 31, 2008), File No. SR-NASDAQ-2008-013, https://www.federalregister.gov/d/E8-17502 [hereinafter "NASDAQ SPAC Approval Order"].

[13] *See*, *e.g.*, Derek K. Heyman, *From Blank Check to SPAC: the Regulator's Response to the Market, and the Market's Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531, 532 (2007), https://kb.osu.edu/handle/1811/78301.

structures typically contained voluntary,[14] but critical, investor protection thresholds before allowing an acquisition or merger to close: (1) the majority of shareholders needed to vote in favor of the transaction; (2) those voting against the transaction could convert their shares back to cash; and (3) no more than some specified threshold of shareholders, typically between 20% and 40%, could elect to redeem their shares for the cash held in escrow.[15] This final prong, by requiring 60% to 80% of shares to remain invested, gave rise to what some describe as a supermajority voting requirement for the business combination. While it was perhaps difficult to achieve, it ensured that the business combination could maintain its anticipated size.[16]

When the exchanges received Commission approval to begin listing and trading SPACs, the exchanges' quantitative requirements codified many industry standards of the time, including the requirement that 90% of the gross proceeds from the IPO be deposited in escrow, and that the business combination be with one or more operating companies with fair market value equal to at least 80% of the net assets in escrow.[17]

The exchanges also codified several qualitative investor protection aspects of early SPACs: the business combination needed to be approved by a majority vote of public shareholders; and each shareholder voting against had the right to convert its shares into a *pro rata* share of the aggregate amount of cash from the trust. NYSE's 2008 listing standards

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[14] *See*, *e.g.*, DAVID N. FELDMAN, REVERSE MERGERS: TAKING A COMPANY PUBLIC WITHOUT AN IPO, 44 (2006) ("…many SPACs adopt many of the restrictions of Rule 419 voluntarily because doing so attracts investors and may prevent unwanted attention from the SEC").

[15] *See*, *e.g.*, Usha Rodrigues and Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPAC*S, 37 DEL. J.CORP. L. 849, 888 (2012), https://digitalcommons.law.uga.edu/fac_artchop/923 (Analysis of 243 SPACs' filed S-1s from 2003-08 found an average conversion threshold of 27.2%, with a minimum of 20% and maximum of 40%).

[16] *See id.*

[17] *See supra* note 12.

contained an additional investor protection: the industry standard conversion threshold prohibiting consummation if shareholders owning more than a threshold amount (which could be set no higher than 40% by the SPAC sponsors) exercised conversion rights.[18] In approving these SPAC listing standards, the Commission noted that conversion rights generally, which were similar in some respects to investor protection measures contained in Rule 419 under the Securities Act,[19] would help to ensure that public shareholders who disagree with management's decision with respect to a business combination have adequate remedies.[20]

After the financial crisis of 2008-2009, however, NASDAQ reported that the one of the central investor protections enshrined in their listing standards – a majority vote to approve the business combination – had been abused by hedge funds and other activist investors. Some market participants had apparently used their ability to vote against the proposed business combination as leverage to obtain additional consideration not available to other, less influential shareholders.[21] NASDAQ labeled this voting abuse "greenmail" and obtained Commission approval to allow SPACs listed on its platform to conduct tender offers instead. In effect, this change gave all shareholders, rather than just those voting against the business combination, the opportunity to redeem their shares in the SPAC for cash. NASDAQ essentially argued that the

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[18] *See* NYSE SPAC Approval Order, *supra* note 12, 73 Fed. Reg. at 27,597.

[19] *See* Offerings by Blank Check Companies, 17 C.F.R. § 230.419 (2021). Rule 419 applies to blank check companies issuing penny stock as defined under Rule 3a51-1(a)(2) of the Act, not to SPACs which generally use an exception to the penny stock definition by structuring the offering to leave the company with greater than $5 million in net tangible assets after the IPO.

[20] *See*, *e.g.*, NYSE SPAC Approval Order, 73 Fed. Reg. at 27,600-01; NASDAQ SPAC Approval Order, 73 Fed. Reg. at 44,796.

[21] *See* Exchange Act Release No. 63607 (Dec. 23, 2010), 75 Fed. Reg. 82,420 (Dec. 30, 2010), File No. SR-NASDAQ-2010-137, https://www.federalregister.gov/d/2010-32904. *See also* SPAC Proposing Release, *supra* note 3, at 231 n.501.

voting protection could be eliminated because the conversion protection had been expanded -- all shareholders were permitted to "vote with their feet" and receive their money back.[22]

In parallel, SPAC industry practices with respect to the conversion rights threshold was also changing quickly and dramatically, significantly altering this investor protection. In 2009, only one SPAC went public, raising approximately $50 million in capital from the over-the-counter market. It did so after setting its conversion rights threshold to 88% – theoretically allowing SPAC sponsors to consummate the business combination even if shareholders representing only $6 million in assets remained invested after the merger announcement.[23] It appears that what had previously served as investor protection had been reduced to a restriction that served mostly to ensure the SPAC did not fall below the $5 million threshold for penny stocks and the application of Securities Act Rule 419.

This revised corporate structure quickly became the new normal. In 2010, the handful of SPACs that went public had an average conversion rights threshold of 63.3% and, in 2011, the almost two dozen SPACS averaged a threshold of 74.4%.[24] While SPACs with significantly higher conversion rights thresholds could not meet the NYSE listing standards, NASDAQ listing standards had never codified a maximum conversion rights threshold.[25]

Listing on an exchange, as opposed to raising money in the over-the-counter market, would prove to be the more attractive option for SPAC sponsors, and researchers have noted that

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[22] *See id.* at 82,422.

[23] *See* Usha Rodrigues & Mike Stegemoller, *Exit, Vice, and Reputation: The Evolution of SPACS*, 37 DEL. J. CORP. L. 849, at 856, 908 (2013).

[24] *See id.* at 908.

[25] *See id.* In 2010, 6 of 7 public SPACs raised money OTC, and in 2011, 17 of 22 SPACs raised money OTC.

since 2011, all SPACs have traded on listed exchanges.[26] The competitive pressure among the exchanges eventually led to a change at the NYSE, which obtained Commission approval in 2017 to amend its SPAC listing standards to eliminate its conversion threshold standard entirely.[27] As NASDAQ had done, NYSE argued that the amendment was needed in order to prevent greenmail. In its proposal, NYSE also noted that the 40% conversion threshold was not part of either NASDAQ or NYSE American listing standards.[28] The exchange argued that risk disclosure constituted sufficient investor protection because warnings in the offering documents about the possibility of extremely significant conversions would adequately enable shareholders to consider the fact that the post-business combination entity "may vary in size" depending on how many shares are redeemed.[29]

III. Recent Developments

We appreciate the financial innovation behind exchange-listed SPACs because they present the potential to bring more private issuers into the public market, especially those that might not have been well served by a traditional IPO.[30] As noted above, public markets offer the

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[26] *See* Minmo Gahng, Jay R. Ritter, & Donghang Zhang, *SPACs*, 61-62, Appendix A1.3 (Dec. 14, 2021) (working manuscript) (on file with the University of Florida College of Business), https://site.warrington.ufl.edu/ritter/files/SPACs.pdf (noting that the last ten SPACs to trade on OTC markets went public in 2011).

[27] *See* New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change Amending Initial and Continued Listing Standards for Special Purpose Acquisition Companies, Exchange Act Release No. 80199 (March 10, 2017), 82 Fed. Reg. 13,905 (March 15, 2017), https://www.federalregister.gov/d/2017-05137.

[28] *See* New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Listing Standards for Special Purpose Acquisition Companies, Exchange Act Release No. 79676 (Dec. 22, 2016), 81 Fed. Reg. 96,150 (Dec. 29, 2016), https://www.federalregister.gov/d/2016-31488. Note that NYSE American was known as NYSE MKT at this time.

[29] *See id.* at 96,151.

[30] *See* SPAC Proposing Release, *supra* note 3, at 179. Table 1 also notes that there have been no OTC SPACs since 2015. All 1,020 SPAC IPOs since have occurred on NASDAQ, NYSE, or now-NYSE American.

potential for enhanced liquidity, transparency, and oversight and moreover, these benefits flow to investors, both retail and institutional. And because exchange listing standards serve as important filters for *bona fide* companies with sufficient float, investor base, and trading interest, investors ought to be able to invest with confidence in SPACs that meet these requirements.

However, existing listing standards with respect to SPACS have opened the floodgates for companies to go public even though the majority of SPAC IPO investors redeem their shares. In recent months, SPAC redemption rates have jumped to over 80%.[31]

This phenomenon has occurred, at least in part, because investors in the SPAC IPO are usually given warrants in addition to common stock. These warrants retain value only if the SPAC ultimately consummates a business combination.[32] As commentators have noted, this feature gives investors an "economic incentive to vote in favor of the deal – because they retain their warrants – even if they believe it is a bad deal."[33] Some have argued that this current SPAC structure amounts to a fatal flaw because shareholders that vote for the proposed transaction but still redeem their shares 'decouple' their vote from their economic interest,[34] and the

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[31] *See* Joanna Makris, *SPAC Market Review, March 2022*, Boardroom Alpha (April 1, 2022), https://www.boardroomalpha.com/spac-market-review-march-2022/ ("Redemptions were 82% in [March], down from 89% in February and just 4% a year-ago. The lower redemptions … can be partly attributed to sweeteners and non-redemption agreements to shareholders, making it slightly more appealing for them to hang onto shares.").

[32] *See generally* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs* 14–15 (Eur. Corp. Governance Inst., Working Paper No. 746, 2021), https://ecgi.global/sites/default/files/working_papers/documents/klausnerohlroggeruanfinal.pdf [hereinafter "A Sober Look at SPACs"].

[33] *See* Stephen Deane, CFA Institute, Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the U.S. House Committee on Financial Services, "*Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections*," (May 24, 2021), https://docs.house.gov/meetings/BA/BA16/20210524/112698/HHRG-117-BA16-Wstate-DeaneS-20210524.pdf [hereinafter, Deane House Testimony].

[34] *See* Usha R. Rodrigues, University of Georgia School of Law, Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the U.S. House Committee on Financial Services, "*Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections,*" (May 24, 2021),

Commission has recently acknowledged this risk as well.[35] By engaging in this type of "empty voting," shareholders can, in effect, vote for an acquisition in which they have no desire or intent to participate.

It appears that the current listing standards fail to protect public investors from an inherent conflict of interest in the consummation of the SPAC's proposed business combination. Exchange listing standards permit these business combinations to occur even when assets are depleted by the significant exercise of conversion rights, and early investors have economic incentives to allow deals of questionable quality to occur. Ultimately, this harms the markets, as well as the investing public, because the current rules allow new companies to enter the public markets despite the fact that large majorities of the SPAC's initial investors redeem their shares, indicating their lack of confidence in the prospects of the merged company.

When a large number of early SPAC investors exercise their conversion rights and remove their investment prior to the consummation, this can require the SPAC sponsors to seek additional capital through deals that offer discounts or side payments, termed "Private Investments in Public Equity" or PIPEs. This is a source of dilution that represents a handicap that the resulting operating company must overcome before it can return profits to ordinary shareholders.[36] Ironically, part of the exchanges' original justification for weakening retail

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https://docs.house.gov/meetings/BA/BA16/20210524/112698/HHRG-117-BA16-Wstate-RodriguesU-20210524.pdf [hereinafter "Rodrigues House Testimony"].

[35] *See* SPAC Proposing Release, *supra* note 3, at 172 ("this could present a moral hazard problem, in economic terms, because these redeeming shareholders would not bear the full cost of a less than optimal choice of target").

[36] *See* Deane House Testimony, *supra* note 33, at 5.

investor protections was that hedge funds were exploiting the structure to take advantage of SPAC sponsors, but it appears that this continues to occur even under the new standards.[37]

SPAC sponsors have even stronger incentives than public investors to pursue business combinations even if the prospects for long-term success are low. In theory, SPAC sponsors, as investors in the deal, should have an economic interest in the long term success of the ultimate business combination that aligns with the members of the public investing alongside them.[38] However, a significant source of the sponsor's compensation is comprised of shares in the business combination, and these shares only have value if a combination occurs. Thus, for the sponsors, a low-quality combination is far better than no combination, and this creates an inventive for sponsors to sometimes pursue less-than-ideal acquisitions.[39]

Recent investor experience, especially with respect to the post-business combination performance of exchange-listed SPACs suffering the exercise of a significant number of conversion rights, calls into question whether current exchange listing standards are protecting investors or are in the public interest. Our review indicates that previous exchange listing standards could have tempered these conflicts of interest for public SPACs, and that it would therefore be appropriate for the exchanges to reintroduce at least some form of a vital investor protection by way of their listing standards. As described above, the exchanges' previously adopted tailored listing standards for SPACs appear to have afforded public investors with

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[37] *See* Financial Times, *Spacs tap alternative funds in desperate hunt for cash*, (March 6, 2022), https://www.ft.com/content/991d89ec-1036-4a9e-b456-27a4a2256d30.

[38] *See*, *e.g.*, Speech, Commissioner Allison Herren Lee, *Investing in the Public Option: Promoting Growth in Our Public Markets*, Remarks at The SEC Speaks in 2020 (Oct. 8, 2020), https://www.sec.gov/news/speech/lee-investing-public-option-sec-speaks-100820.

[39] *See id. See also* A Sober Look at SPACs, *supra* note 32, at 20-21, Part III.A. The Sponsor's "Promote" and Cash Investment (2021).

significant protections – the right to vote for the proposed business combination, the right of dissenters to convert their shares back to cash, and, on NYSE, the requirement that no more than 40% of the outstanding shares exercise these conversion rights. These original public listing standards, and in particular the conversion rights threshold, prevented significant empty voting because, if enough shareholders voted with their feet against the deal, there was no way for SPAC sponsors to finalize a poorly-received business combination.

With the allegations of abusive hedge fund greenmail in the shareholder voting process, the exchanges looked for solutions that would remove the ability of hedge funds to take advantage of the SPACs and public investors. The first solution – enhancing investor conversion rights at the expense of voting rights – may have appeared reasonable at the time. All SPAC shareholders would be permitted to "vote with their feet" and receive their money back, and fulsome disclosure of this risk would put remaining investors on notice of the risk of under-funded business combinations. But the second solution – eliminating meaningful conversion rights thresholds and replacing the protection with registration statement risk disclosures – placed significant burdens on public investors[40] and has proven ineffective.

Unfortunately, the reasoning that the exchanges used to justify the alteration of SPAC investor protections has neither withstood the test of time nor the law of unintended consequences. The combination of these industry-friendly solutions has clearly benefitted SPAC sponsors and sophisticated IPO participants, but at the expense of public investors. Although

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[40] While the Commission's recent proposal seeks to better disclose the impact of redemptions and dilution on the book value per share through the use of a table that shows the remaining book value per share at various percentages of redemptions, *see* SPAC Proposing Release, *supra* note 3, at 38, our research suggests that investors are not served well by redemption thresholds that can go as high as 80% and still list on the public exchanges.

attentive, skeptical shareholders may walk away with their cash back, the unwitting shareholders remaining in the transaction are, in a real sense, left "holding the bag." Commenters have noted that, "with these voting protections gone, skeptics can cash out, leaving only the convinced or the unwary—thus eliminating the market test of the transaction that SPAC originators touted as a key safeguard."[41]

Academics have questioned whether an investment vehicle in which public investors are routinely asked to "subsidize" the resulting public companies by suffering significantly at the start, either due to undercapitalization or dilution from a PIPE deal, is sustainable.[42] In our view, it would be better for all parties, including SPAC sponsors, investors, and the listing exchanges, if the SPAC business model were sustainable. The exchanges are in a unique position to move the industry back to a more sustainable path quickly.

IV. Conclusion

We urge the exchanges to revisit their SPAC listing standards with an eye toward enhancing investor protection in light of recent events. Although we support efforts to facilitate capital formation and bringing more operating companies into the public market, we have significant reservations about the consequences of the current listing standards that allow for empty voting and otherwise permit significant conflicts of interest.

In this case, there appears to be a targeted and tailored action that the exchanges could take to restore the balance and thereby benefit both long-term investors and issuers. We urge the exchanges to restore a conversion rights threshold of at least 50 percent so as to ensure at least

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[41] *See* Rodrigues House Testimony, *supra* note 34, at 9.

[42] *See generally* A Sober Look at SPACs, *supra* note 32.

half of the outstanding shares of the SPAC believe in the deal enough to remain invested. If the majority of shares "vote with their feet" and significantly dilute the deal, then the deal should fall through rather than reward SPAC sponsors at the expense of the remaining minority of investors.

As a final note, we believe that the recommended action must be taken by all exchanges that list SPACs, because to do otherwise would simply incentivize a "race to the bottom" amongst the exchanges, which was part of the NYSE's justification for eliminating the conversion threshold in the first place.[43]

CC: Gary Gensler, SEC Chair
Hester M. Peirce, SEC Commissioner
Allison Herren Lee, SEC Commissioner
Caroline A. Crenshaw, SEC Commissioner
Haoxiang Zhu, SEC Director, Division of Trading and Markets
Renee Jones, SEC Director, Division of Corporation Finance

[43] *See*, *e.g.*, Concept Release Concerning Self-Regulation, Exchange Act Release No. 50700 (Nov. 18, 2004), 69 Fed. Reg. 71,256 (Dec. 8, 2004), https://www.sec.gov/rules/concept/34-50700.htm ("As with SRO competition for members and order flow, competition for issuers may cause an SRO to fail to discharge its self-regulatory responsibilities properly. This can take the form of admitting to trading issuers that fail to satisfy initial listing standards; delaying the delisting of issuers that no longer satisfy maintenance standards; failing to enforce listing standards (including the new issuer corporate governance standards); and reducing (or even eliminating) listing fees. This competition also can reveal itself in an unwillingness to restrict issuer activities or impose requirements that may be more stringent than similar rules of competitor SROs").